

DURIE TANGRI LLP  
SONAL N. MEHTA (SBN 222086)  
smehta@durietangri.com  
JOSHUA H. LERNER (SBN 220755)  
jlerner@durietangri.com  
LAURA E. MILLER (SBN 271713)  
lmiller@durietangri.com  
CATHERINE Y. KIM (SBN 308442)  
ckim@durietangri.com  
ZACHARY G. F. ABRAHAMSON (SBN 310951)  
zabrahamson@durietangri.com  
217 Leidesdorff Street  
San Francisco, CA 94111  
Telephone: 415-362-6666  
Facsimile: 415-236-6300

Attorneys for Defendant  
Facebook, Inc.

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF SAN MATEO

SIX4THREE, LLC, a Delaware limited liability  
company,

Plaintiff,

v.

FACEBOOK, INC., a Delaware corporation;  
MARK ZUCKERBERG, an individual;  
CHRISTOPHER COX, an individual;  
JAVIER OLIVAN, an individual;  
SAMUEL LESSIN, an individual;  
MICHAEL VERNAL, an individual;  
ILYA SUKHAR, an individual; and  
DOES 1-50, inclusive,

Defendants.

Case No. CIV 533328

**Assigned for all purposes to Hon. V. Raymond  
Swope, Dept. 23**

**OBJECTION TO SIX4THREE'S LIMITED  
SCOPE COUNSEL'S CIVIL PROCEDURE  
CODE SECTION 170.6 CHALLENGE**

Dept: 23 (Complex Civil Litigation)  
Judge: Honorable V. Raymond Swope

FILING DATE: April 10, 2015

1 **I. INTRODUCTION**

2 Plaintiff Six4Three, LLC (“Six4Three”), its principal Ted Kramer, and its legal team, violated a  
3 fundamental tenet of civil discovery by orchestrating the public disclosure of highly confidential  
4 information produced by Facebook in discovery under a good-faith belief that, like all civil litigants in  
5 this country and the state of California, the opposing party would respect the protective order entered by  
6 the Court. In the now months-long shadow of their admitted betrayal of that basic principle of civil  
7 litigation, Six4Three further abused the process by delaying any investigation and remedial action based  
8 on its unrepresented status, and now, when time to get new counsel is up, to avoid having to answer to  
9 the Judge whose orders it violated.

10 Six4Three and its lawyers were caught orchestrating one of the largest and most damaging  
11 violation of a protective order in history. They developed a plan that required repeated violations of the  
12 Protective Order in this case and the subsequent orders intended to enforce the Protective Order. They  
13 executed that plan. The result is staggering: Facebook’s highly confidential information—which  
14 Facebook produced based on the premise that the Court would be able to enforce its orders if they were  
15 not followed—is spread around the world.

16 Ever since they were caught, however, Six4Three and its lawyers have executed a second  
17 plan: Halt the progress of this case so that no discovery occurs so that no one ever knows the scope of  
18 their violations of this Court’s orders. They have had no more regard for the Court after the breach of the  
19 Protective Order than they did before. The result is no less staggering: More than half a year after the  
20 breach, no discovery has occurred. Six4Three and its counsel have come up with excuse after excuse in  
21 order to halt discovery. As a result, the party and counsel least respectful of the orders in this case have  
22 been controlling the pace of the case.

23 Most recently, Macdonald Fernandez LLP’s (“Macdonald Fernandez”) peremptory challenge is  
24 untimely and otherwise unauthorized by Civil Procedure Code section 170.6. Section 170.6 does not  
25 allow a party to gain an unlimited extension to file a peremptory strike by replacing their lawyer. In  
26 cases with an all-purpose judicial assignment like this one, parties have 15 days to strike a judge. For  
27 Six4Three, that deadline passed eighteen months ago.

1 The analysis should stop there. But Macdonald Fernandez’s challenge suffers from other fatal  
2 deficiencies. Macdonald Fernandez’s representation of Six4Three is “strictly limited” to defending  
3 against a motion for sanctions. No such motion has been filed, and so there is no apparent scope to  
4 Macdonald Fernandez’s representation of Six4Three. Thus, at present, the law firm lacks standing to  
5 bring this peremptory challenge. In addition, the Declaration of Reno F.R. Fernandez III claims that the  
6 judge assigned to this case is prejudiced against *either* Six4Three *or* Mr. Fernandez. But there is no  
7 dispute that any peremptory challenge filed by Six4Three would be untimely. Even if section 170.6  
8 permitted Mr. Fernandez to challenge the judge that has been overseeing this litigation for a year and a  
9 half—it does not—Mr. Fernandez must clarify that he believes that the judge is prejudiced as to him, and  
10 not Six4Three alone.

11 Macdonald Fernandez’s peremptory challenge should be denied.

## 12 **II. FACTUAL BACKGROUND**

13 Six4Three’s lawsuit is now well into its fourth year. The case has seen multiple rounds of  
14 demurrers that limited Six4Three’s far-ranging claims, a ruling that Six4Three spoliated evidence and so  
15 can claim only \$412 in total revenue over its nearly 3-year existence, and a successful motion for  
16 summary adjudication limiting remedies based on the parties’ agreed limitation of liability. The  
17 Honorable V. Raymond Swope has been singly assigned to this litigation for all purposes since January  
18 29, 2018. *See generally* Order Reassigning Judge for All Purposes (Jan. 29, 2018).

19 Without belaboring history that this Court lived, in the fall of 2018, Mr. Kramer made contact  
20 with a member of the United Kingdom Parliament, encouraging him to send a formal request to Mr.  
21 Kramer for the confidential and highly confidential information that Facebook produced in this litigation.  
22 Mr. Kramer then traveled to London with Facebook’s documents, where he turned them over to the  
23 member of Parliament, in direct violation of multiple orders of this Court.

24 Following this improper disclosure, Six4Three’s counsel sought to withdraw, citing an  
25 unwaivable conflict. The Court granted the motion to withdraw on April 30, 2019. After Six4Three  
26 failed to secure substitute counsel in a timely manner, the Court ordered Six4Three to “to retain counsel  
27 so that you can defend against *any* actions that may be pursued by Facebook.” Hr’g Tr. at 8:8–10 (June  
28 7, 2019) (emphasis added). The Court set a deadline of June 28, 2019 for the retention of counsel, and

1 directed Six4Three’s sole member, Ted Kramer, to file a declaration no later than July 1, 2019 stating  
2 that Six4Three had retained counsel or attesting to Six4Three’s efforts to do so. *See* Order re: Retention  
3 of Counsel by Plaintiff Six4Three, LLC (June 19, 2019). On July 1, Mr. Kramer filed a declaration  
4 stating that on June 28, he had “executed a retainer agreement with a law firm on behalf of Plaintiff  
5 Six4Three, LLC, ***for representation of Plaintiff in the present matter.***” Kramer Decl. re: Order re:  
6 Retention of Counsel by Plaintiff Six4Three, LLC ¶ 2 (July 1, 2019) (emphasis added). The following  
7 day, Macdonald Fernandez LLP entered a notice of appearance and a notice of limited scope  
8 representation stating:

9           We will defend a motion for sanctions if brought by the defendants as  
10          contemplated in their recent case management conference statement, and  
11          we will appear at the case management conference set for July 19, 2019, if  
            it goes forward. This engagement is strictly limited. If we agree to  
            perform any other or further work, this notice will be amended.

12 *See* Notice of Limited Scope Representation (July 2, 2019). Facebook has not filed a motion for  
13 sanctions, and no other attorney has filed a notice of appearance on behalf of Six4Three.

### 14 **III. ARGUMENT**

#### 15 **A. Legal Standard**

16 Civil Procedure Code section 170.6 imposes strict time requirements on peremptory challenges.  
17 *See* Civ. Proc. Code § 170.6(a)(2). Where a section 170.6 challenge is “directed to the trial of a civil  
18 cause ***that has been assigned to a judge for all purposes***, the motion shall be made to the assigned judge  
19 or to the presiding judge by a party ***within 15 days*** after notice of the all purpose assignment . . . .” *Id.*  
20 (emphases added).

21 A judge may not waive the untimeliness of a peremptory challenge, and an untimely challenge  
22 must be denied. *See Briggs v. Superior Court*, 87 Cal. App. 4th 312, 318 (2001) (“We are aware of no  
23 authority that a trial judge may ‘waive’ the untimeliness of a section 170.6 affidavit.”). Indeed, because  
24 section 170.6 presents the potential for abuse and judge-shopping, “the courts are vigilant in enforcing  
25 the statutory restrictions on the number and timing of the motions permitted.” Michael Paul Thomas,  
26 *Cal. Civ. Courtroom Handbook*, Peremptory Disqualification of Judge § 14.4 practice note (2019 ed.)  
27 (quoting *Peracchi v. Superior Court*, 30 Cal. 4th 1245, 1251–1253 (2003) (“We cannot permit a device  
28

intended for spare and protective use to be converted into a weapon of offense and thereby to become an obstruction to efficient judicial administration.”)).

**B. Macdonald Fernandez’s Peremptory Challenge Is Untimely Because This Case Is Singly Assigned for All Purposes.**

Civil Procedure Code section 170.6 is clear: Where a civil action is singly assigned for all purposes, a peremptory challenge must be brought “within 15 days after notice of the all purpose assignment.” Civ. Proc. Code § 170.6(a)(2). There is no exception to this requirement that permits an attorney making a new appearance to challenge the all purpose assignment 18 months after it occurs. Here, this case was singly assigned to Judge Swope for all purposes on January 29, 2018. *See* Order Reassigning Judge for All Purposes (Jan. 29, 2018). That order expressly stated that the case was reassigned “*for all purposes* to the Honorable V. Raymond Swope in Department 23.” *Id.* at 2 (emphasis added). Six4Three did not timely challenge that assignment and so waived its statutory right to do so. On this basis alone, the challenge should be rejected.

Macdonald Fernandez’s peremptory challenge is plainly untimely and the firm’s arguments to the contrary fail. The relevant provision of section 170.6(a)(2) states:

If directed to the trial of a civil cause that has been assigned to a judge for all purposes, the motion shall be made to the assigned judge or to the presiding judge by a party within 15 days after notice of the all purpose assignment, or if the party has not yet appeared in the action, then within 15 days after the appearance.

Civ. Proc. Code § 170.6(a)(2). According to Macdonald Fernandez, because that provision references only a “party” and not an “attorney,” it has no application for attorneys at all. The more natural reading of the statute is that a party must move within 15 days of assignment. Full stop. This reading is also the only reasonable or logical reading of the code.

Indeed, Macdonald Fernandez’s reading of this provision would generate absurd results. *First*, the reading would eviscerate the policy behind limiting peremptory challenges to a specific timeframe. If an attorney for a party in a case that has been singly assigned for all purposes is not bound by this provision, then there is *no* restriction on their ability to file the challenge. In other words, an attorney in a singly assigned case, according to Macdonald Fernandez, can file a Section 170.6 challenge at any

point (prior to the drawing of the name of the first juror at trial), regardless of when the case was assigned or when they make an appearance.

**Second**, Macdonald Fernandez’s reading would promote judge-shopping. California’s Supreme Court has rejected that result. In *Pappa v. Superior Court*, 54 Cal. 2d 350, 355 (1960), one codefendant peremptorily challenged a judge. Later, the other codefendant sought to do so and the Court rejected that attempt, noting that separate representation was no exception to section 170.6’s “one motion to each ‘side’ policy”:

Nor does the fact that an attorney may exercise the privilege under section 170.6 mean that the limitation of one motion to each “side” may be ignored . . . . Otherwise, ***a party who exercised a challenge could continue to obtain disqualifications endlessly by the simple expedient of changing attorneys.***

*Id.* at 355–56 (emphasis added). For this reason, California’s Rutter Guide teaches that “[a]lthough the Code states ‘any attorney’ may make a § 170.6 challenge, ***change of counsel does not create the right to exercise an additional challenge.***” See William E. Wegner, et al., *Cal. Practice Guide – Civil Trials and Evidence* § 3:176 (The Rutter Group 2018 ed.) (emphasis added).

Unsurprisingly, Macdonald Fernandez gives no authority endorsing its interpretation of Civil Procedure Code section 170.6(a)(2). There is none. To the contrary, California’s appellate courts recognize, “[t]he right to a peremptory challenge ***is subject to various conditions which have no stated exception for a late appearing counsel.***” *People v. Superior Court (Smith)*, 190 Cal. App. 3d 427, 430 (1987) (emphasis added). This outcome is not unduly harsh, as a party may always rely on a challenge for cause where circumstances warrant. See generally Civ. Proc. Code § 170.1. But where a party or its lawyer seeks to invoke the limited statutory allowance of section 170.6, it must do so according to that section’s strictures.

**C. Macdonald Fernandez Lacks Standing to File This Peremptory Challenge Because Their Representation Is Illusory.**

The Court should also reject Macdonald Fernandez’s challenge because it is not clear that the firm represents Six4Three at present in this litigation. The terms of Macdonald Fernandez’s limited-scope representation narrowly limit the firm’s representation of Six4Three to an event that has not occurred. The firm’s Notice of Limited Scope Representation states that Macdonald Fernandez “will

1 defend a motion for sanctions *if brought by the defendants*” and that the firm “will *appear* at the case  
2 management conference set for July 19, 2019, *if it goes forward*.” Notice of Limited Scope Rep. at 1  
3 (emphases added). But Defendants have not moved for sanctions. And Macdonald Fernandez’s notice  
4 does *not* state that the firm will *represent* Six4Three at the July 19, 2019 conference, only that it will  
5 appear. *Id.* Because these conditions “strictly limit[]” Macdonald Fernandez’s engagement, the firm has  
6 no apparent basis to represent Six4Three in this litigation. Accordingly, notwithstanding the firm’s  
7 notice of appearance, it lacks standing to bring a Section 170.6 challenge. *See Avelar v. Superior Court*,  
8 7 Cal. App. 4th 1270, 1274 n.4 (1992), *modified* (July 31, 1992) (“The provision that ‘[a]ny party to or  
9 attorney appearing in’ a special proceeding may file a challenge cannot be reasonably construed to give a  
10 right to an attorney who appears for other than a party.”) (alterations in original)).

11 **D. Macdonald Fernandez’s Declaration in Support of Its Peremptory Challenge Is**  
12 **Improper.**

13 In addition to the timeliness and standing problems, the declaration submitted by Reno F.R.  
14 Fernandez III is deficient. Even if Macdonald Fernandez is correct that they may make a peremptory  
15 challenge on their own behalf as newly appearing attorneys (they cannot), there is no dispute that  
16 Six4Three has waived its own right to file a challenge. As a textual matter, Civil Procedure Code section  
17 170.6 provides a peremptory challenge to a party or attorney when *that party or attorney* swears that a  
18 court is prejudiced against *that party or attorney*. *See* Civ. Proc. Code § 170.6(a)(2). *See* Wegner, *supra*  
19 § 3:169 (“The only ‘ground’ that need be shown is that the party or attorney believes (a) the challenged  
20 judge is prejudiced against *such party or attorney*[.]”) (emphases added and omitted). But Mr.  
21 Fernandez’s declaration includes multiple statements in the alternative, leaving ambiguous whether “he  
22 or she” believes that Judge Swope “is prejudiced against the party,” Six4Three, “or his or her attorney,”  
23 Macdonald Fernandez. Even under Macdonald Fernandez’s misreading of section 170.6, the *only*  
24 relevant prejudice would necessarily be toward Macdonald Fernandez. If Macdonald Fernandez’s  
25 challenge is based on an allegation of prejudice against the law firm, it must say so in a sworn declaration  
26 under penalty of perjury.

1 **IV. CONCLUSION**

2 Macdonald Fernandez's peremptory challenge is untimely and otherwise unauthorized by section  
3 170.6 and should be rejected.  
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5 Dated: July 5, 2019

DURIE TANGRI LLP

6  
7 By: \_\_\_\_\_



SONAL N. MEHTA  
JOSHUA H. LERNER  
LAURA E. MILLER  
CATHERINE Y. KIM  
ZACHARY G. F. ABRAHAMSON

10 Attorneys for Defendant  
11 Facebook, Inc.  
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**PROOF OF SERVICE**

I am employed in San Francisco County, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years, and not a party to the within action. My business address is 217 Leidesdorff Street, San Francisco, CA 94111.

On July 5, 2019, I served the following documents in the manner described below:

**OBJECTION TO SIX4THREE'S COUNSEL'S SECTION 170.6 CHALLENGE**

☒ **BY ELECTRONIC SERVICE:** By electronically mailing a true and correct copy through Durie Tangri's electronic mail system from cortega@durietangri.com to the email addresses set forth below.

On the following part(ies) in this action:

MACDONALD | FERNANDEZ LLP  
Reno F.R. Fernandez III  
Matthew J. Olson  
221 Sansome Street, Third Floor  
San Francisco, CA 94104  
Reno@MacFern.com  
Matt@MacFern.com  
Samantha@MacFern.com

*Attorneys for Plaintiff, Six4Three, LLC*

Stuart G. Gross  
GROSS & KLEIN LLP  
The Embarcadero, Pier 9, Suite 100  
San Francisco, CA 94111  
sgross@grosskleinlaw.com

David S. Godkin  
James Kruzer  
BIRNBAUM & GODKIN, LLP  
280 Summer Street  
Boston, MA 02210  
godkin@birnbaumgodkin.com  
kruzer@birnbaumgodkin.com

Jack Russo  
Christopher Sargent  
ComputerLaw Group, LLP  
401 Florence Street  
Palo Alto, CA 94301  
jrusso@computerlaw.com  
csargent@computerlaw.com  
ecf@computerlaw.com

*Attorney for Theodore Kramer and Thomas Scaramellino (individual capacities)*

James A. Murphy  
James A. Lassart  
Thomas P Mazzucco  
Joseph Leveroni  
Murphy Pearson Bradley & Feeney  
88 Kearny St, 10th Floor  
San Francisco, CA 94108  
JMurphy@MPBF.com  
jlassart@mpbf.com  
TMazzucco@MPBF.com  
JLeveroni@MPBF.com

*Attorney for Birnbaum & Godkin, LLP*

1 Donald P. Sullivan  
2 Wilson Elser  
3 525 Market Street, 17th Floor  
4 San Francisco, CA 94105  
5 donald.sullivan@wilsonelser.com  
6 Joyce.Vialpando@wilsonelser.com  
7 Dea.Palumbo@wilsonelser.com

8 *Attorney for Gross & Klein LLP*

9 I declare under penalty of perjury under the laws of the United States of America that the  
10 foregoing is true and correct. Executed on July 5, 2019, at San Francisco, California.  
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Christina Ortega